SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1138

JACK HENSLEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

In a footnote to Respondent's brief (p. 5), filed in opposition to the petition for certiorari, a statement is made as follows:

> "While the record is silent as to the reason for this action of the district court, we have been advised by the United States Attorney that the court concluded that count 3 did not charge an offense. That conclusion seems sound, for count 3 charged unlawful possession of marihuana without retaining the order form required by law, whereas the gist of the offense under Section 2593 (a) of the Internal Revenue Code, under which count 3 was apparently drawn, is the acquisition of marihuana without payment of the required transfer tax."

The fact of the matter is that the record is completely silent for the court's action in vacating its judgment. The

trial counsel for Petitioner has advised that he knows of no reason for the court's action, and that the Assistant United States Attorney prosecuting the case is also without such information.

The only differences between the counts of the two indictments are as follows:

"Criminal No. 72,270	"Criminal No. 71,133
Violation Marihuana Tax Act of 1937	Violation Marihuana Tax Act of 1937
July Term, A. D. 1943.	October Term, A. D. 1942.
• • •	• • •
That one Jack Hensley • • • did • • • unlawfully, fraudulently, feloniously and knowingly transfer to one Benjamin Groff, a quantity of Marihuana • • • which said transfer was not made in pursuance of a written order of the said Benjamin Groff, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Section 2591 (a) of the Internal Revenue Code."	That one Jack Hensley • • • unlawfully, feloniously, wilfully and knowingly did transfer, sell, barter, exchange and give away to one Benjamin Groff, a certain quantity of marihuana, • • • not in pursuance of a written order from the said Benjamin Groff, on a form issued in blank for that purpose by the Secretary of the United States Treasury."

Petitioner submits that the first indictment, No. 71,133, was a valid indictment. Section 2591 of the Act provides in substance that it shall be unlawful for a person to transfer marihuana except in pursuance of a written order on a form to be issued in blank by the Secretary (Secretary of the Treasury). Section 2600 permits the Secretary to delegate any of the powers and duties conferred or imposed on him, upon such officers or employees of the Treasury

Department as he shall delegate or appoint. It will be noted that in the original indictment, No. 71,133, the charge followed the specific language of the statute, and the mere fact that under his statutory powers the Secretary of the Treasury had delegated the function of supplying the requisite forms to the Collector of Internal Revenue should in no wise invalidate the indictment.

The matter has been definitely settled in the District of Columbia by the case of *Cromer* v. *United States*, 1944, 78 U. S. App. D. C. 400, 142 F. (2d) 697, Cert. denied 322 U. S. 760, 64 S. Ct. 1274, 88 L. Ed. 1588, wherein an indictment had alleged that the written order in a narcotic case should have been issued on a form for that purpose by the Commissioner of Internal Revenue, whereas the authority in fact was vested in the Commissioner of Narcotics. In sustaining the indictment, the Court said:

> "There is no possibility that the defendant did not know the nature and character of the offense charged, or that he was misled or handicapped in preparing his defense by the alleged misdescription of the Treasury subordinate authorized to issue the narcotic order. There is also no possibility that the alleged erroneous description could subject the appellant to another trial for the same offense. We think that the principle applied in *Berger* v. *United States* with respect to a variance between the indictment and proof is equally applicable to a technical error in the indictment, and that some actual prejudice to the defendant would have to be shown in order to justify reversal of a conviction on the ground of such an error."

To like effect are the cases of *Ainsworth* v. *Sanford*, 104 F. (2d) 96 (1939) and *Czarnecki* v. *United States* (C. C. A. N. J. 1938) 95 F. (2d) 32.

Not only did the first indictment strictly follow the statute, but the defendant interposed no objection to its form and was not prejudiced by its designation therein of the

Secretary of the Treasury. It is evident that the indictment referred to the same line of authority and this was apparent to the petitioner. See also *Nordlinger* v. *United States* (1904) 24 App. D. C. 406.

Conclusion

The petition for certiorari should be granted because, if the ruling below is established as future Federal criminal procedure, the professional integrity of Federal prosecutors would be impugned, defense counsel would be unable to rely upon promises to *nolle prosse* counts of an indictment inextricably associated with a plea of guilty, and the defendant's service of sentence would be unsettled and subject to double punishment for the same offense.

Respectfully submitted,

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